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In the
Supreme Court of the United States
October Term, 1984

LARRY FLYNT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the trial court erred in commencing the hearing on a Rule to Show Cause where the prior behavior raised questions as to the defendant's competency.

(2) Whether the Seventh Circuit may have been persuaded to uphold the trial court by a fact outside of the record.

PARTIES INVOLVED

Petitioner, Larry Flynt, was the defendant in the United States District Court for the Northern District of Illinois, Eastern Division, and he was the appellant in the United States Court of Appeals for the Seventh Circuit.

Respondent, United States of America, was the plaintiff (prosecution) in the trial court and the appellee in the United States Court of Appeals for the Seventh Circuit.

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(1) The decision of the trial court in commencing the hearing on a Rule to Show Cause was error where the prior behavior raised questions as to the defendant's competency. The Court should grant certiorari to establish uniform guidelines for Section 4244 when dealing with unruly defendants who may be afflicted with a mental disorder.	8
(2) The decision below seriously erodes the federally guaranteed constitutional right to due process of law when the Seventh Circuit premised its decision on facts not contained in the record. This Court should grant certiorari to reinforce the principle that matters not contained in the record must not be considered in the disposition of an appeal.	13
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Larry Flynt (referred to hereafter as defendant), respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, to review its decision affirming his conviction.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming his conviction, No. 84-1012, is unpublished, but is contained in the Appendix. The order of the United States Court of Appeals for the Seventh Circuit denying defendant's petition for re-

hearing with suggestion for rehearing in banc, August 16, 1984, is unpublished, but is enclosed in the Appendix.

JURISDICTION

On July 19, 1984, the United States Court of Appeals for the Seventh Circuit delivered its opinion affirming defendant's conviction (Appendix A). His timely petition for rehearing in banc was denied on August 16, 1984 (Appendix B). This petition to review the judgment of a federal court of appeals is timely filed within 60 days thereafter. Jurisdiction of this Court is invoked pursuant to 28 USC, Section 1254(1) and Rule 20.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in part:

> "No person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

Title 18, USC, Section 401(1) provides:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> "(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;"

Title 18, USC, Section 4244, provides:

> "Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period

of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other faciiity to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury."

STATEMENT OF THE CASE

Nature of the Case

On December 6, 1983, the Government, by and through the United States Attorney for the Northern District of Illinois, caused to be filed a Petition for a Rule to Show Cause why Larry Flynt should not be held in criminal contempt of Court pursuant to Title 18, United States Code, Section 401(1).

The allegations contained in the Petition arose when the defendant appeared before United States Magistrate Olga Jurco, in Chicago on December 5, 1983.

Subsequently, defendant was brought before the Honorable Frank J. McGarr, Chief Judge, United States District Court for the Northern District of Illinois, to answer as to why he should not be held in contempt of Court by reason of the fact of his alleged conduct before Magistrate Jurco. It was during this hearing that defendant was found to be in present contempt of court and sentenced to the custody of the Attorney General for a period of sixty (60) days.

STATEMENT OF FACTS

On December 6, 1983, the defendant, Larry Flynt, was found to be in present contempt of Court in the United States District Court for the Northern District of Illinois, Eastern Division. The finding of contempt was made by the Honorable Frank J. McGarr, pursuant to Title 18, United States Code, Section 401(1) (CR 4). The defendant was sentenced then and there to the custody of the

Attorney General for a period of sixty days (60) days (CR 4).[1]

The Petition for Rule to Show Cause

The defendant had been arrested at Chicago's O'Hare Airport on a warrant issued out of the United States District Court for the Central District of California, necessitating his appearance before Magistrate Jurco (CR 6).

It was during his appearance before Magistrate Jurco that the defendant allegedly conducted himself in such a fashion as to cause the United States Attorney for the Northern District of Illinois to file the Petition for Rule to Show Cause. It was on this Petition that Mr. Flynt appeared before Judge McGarr on December 6, 1983.

The Hearing on the Rule

At the hearing, the court was informed by Mr. Stephen Zucker, an attorney at law, that Mr. Flynt would be acting as his own counsel and that he would be advising him (Tr 2). The court was further advised that Mr. Flynt was first given a copy of the Petition for Rule to Show Cause ten minutes prior to the hearing (Tr 3).

Mr. Zucker and Mr. Flynt both made oral motions to continue the hearing for the purpose of preparing a defense (Tr 3). The court denied the motion (Tr 4).

---

[1] The defendant was immediately taken into custody and was returned to California. From there he was sent to Springfield, Missouri, the federal correctional evaluation facility. Defendant completed his sixty (60) day sentence at Springfield.

Mr. Flynt's conduct at this point was such that the court admonished him to be quiet (Tr 5). The court further, at Mr. Flynt's request, ordered the handcuffs loosened (Tr 5).[2]

Mr. Flynt proceeded to make three oral motions which were denied by the court (Tr 6). The first was to allow him an opportunity to obtain a lawyer of his choice. Second, he moved for permission to allow television cameras in court. Finally, he sought to have the press cleared from the courtroom.

The defendant was then allowed to read to the court what he termed a petition (Tr 7-10) in which a psychiatric evaluation at the federal facility at Springfield, Missouri, was one of the requests he made (Tr 10). His petition was denied (Tr 10).

The hearing commenced with the government calling its first witness (Tr 16). After the witness was cross-examined by Mr. Flynt, the government rested (Tr 26). After some discussion, the court continued the hearing until Friday of that week, December 9, to allow Mr. Flynt time to prepare his defense (Tr 28). Mr. Flynt began to address the court about medical needs and interrupted Judge McGarr as he attempted to question someone from the Metropolitan Correctional Center, where he was confined. After being told to be quiet, Mr. Flynt began to use language which caused the court to respond, "That raises questions as to your sanity. All right I have been called obscene names and spit at—" (Tr 29).

---

[2] Mr. Flynt is confined to a wheel chair and was brought into court handcuffed to his wheel chair.

At this juncture, the court found Mr. Flynt in present contempt of court and sentenced him to sixty (60) days in the custody of the Attorney General (Tr 29).

The Decision of the Appellate Court

The Seventh Circuit premised its unpublished decision on facts not contained in the record by stating:

> " [8] This Court does not decide whether or not Flynt actually was competent at the time of the proceeding. However, at oral argument we were advised that Flynt was found competent by the federal facility at Springfield, Missouri, soon after the contempt hearing." (Unpublished Order 6)

In determining that the District Court did not err in proceeding with Flynt's show cause hearing without obtaining a Section 4244 evaluation, per the request of the Assistant United States Attorney, the court concluded:

> " [11] Our affirmance does not mean that we would necessarily have dispensed with a Section 4244 evaluation if we were sitting as *nisi prius* judges." (Unpublished Order 8)

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE TRIAL COURT IN COMMENCING THE HEARING ON A RULE TO SHOW CAUSE WAS ERROR WHERE THE PRIOR BEHAVIOR RAISED QUESTIONS AS TO THE DEFENDANT'S COMPETENCY. THE COURT SHOULD GRANT CERTIORARI TO ESTABLISH UNIFORM GUIDELINES FOR SECTION 4244 WHEN DEALING WITH UNRULY DEFENDANTS WHO MAY BE AFFLICTED WITH A MENTAL DISORDER.

Larry Flynt appeared before Judge McGarr in proceedings brought by the government seeking a Rule to Show Cause why he should not be held in criminal contempt of court for alleged conduct which occurred December 5, 1983, before United States Magistrate Olga Jurco. Because the defendant was found to be in present contempt of court before Judge McGarr, the hearing on the Petition was never completed. The court ordered it continued generally until further order of the court.

In its Petition, the government described the conduct as follows:

> "3. Thereupon, Larry Flynt interrupted the proceedings by behaving in the presence of the Court in an unruly insulting and then contemptuous manner, in that he directed a tirade against the United States Magistrate, insulting the Court and the magistrate's person with obscene and scurrilous language.
>
> "4. During the course of his insulting and abusive tirade Larry Flynt threw a folded flag of the Soviet Union at the Magistrate. The flag struck the bench." (CR 2)

The conduct complained of is not an isolated incident of bizarre behavior. As a public figure, Mr. Flynt's ir-

rational actions are routinely reported by the national press and have become generally well known. In the weeks just preceding his arrest by federal marshals when he arrived in Chicago at O'Hare International Airport, he drew national attention by a series of defiant acts. For example, Mr. Flynt engaged a 707 Jet to fly across the Arctic Circle following the same route as that of the Korean airliner, Flight 707, which was shot down by the Russians. He hired Las Vegas prostitutes to carry large amounts of money to the Clerk's office of the Central District Court to pay a fine for contempt. He wore an American flag as a diaper.

Witnesses to such behavior must seriously question whether or not Mr. Flynt is in rational control of his mental faculties. It was in the context of a *modus vivendi* of irrationality, then, that Mr. Flynt appeared before Judge McGarr on the afternoon of December 6, 1983.

Case law has established that after a defendant is arrested and prior to trial, if there is adequate showing that there is reasonable cause to believe the accused may not be competent, then an examination into his fitness should be ordered. *Rose* v. *United States,* 513 F2d 1251, 1256 (8th Cir 1975).

The court committed grievous error in allowing the government to go forward on its Petition against Mr. Flynt after the Court itself had raised the issue of Flynt's "psychiatric problems." (Tr 11).

This was not an isolated incident or observation, something briefly mentioned. It was a glaring question which the Assistant United States Attorney was well aware of prior to the commencement of the hearing. This was borne out later when the Court and the Assistant discussed

the fact that the United States Attorney in Los Angeles and Flynt's defense attorney had agreed that a psychiatric evaluation would be helpful (Tr 2A). There were two hearings held on December 6, 1983. The first at 12:00 noon where the defendant was present and the second at 4:00 p.m. where the U.S. Attorney and Mr. Zucker appeared before the Court.

When the United States Attorney has information causing him to have reasonable doubt as to the competency of a criminal defendant, he is duty bound to report it to the Court and to request a mental examination. *United States* v. *Varner*, 467 F2d 659 (5th Cir. 1972). This was not done in the instant case.

Title 18 USC section 4244 provides in part:

> "Whenever after arrest and prior to the imposition of sentence . . . the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceeding against him or properly assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused . . . or upon its own motion, the Court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition. . . ."

When there exists some unusual behavior on the part of a defendant before or during his trial, it may reflect upon his current mental competency. *United States* v. *Clark*, 617 F2d 180 (9th Cir. 1980). This was the situation in the instant case where Flynt repeatedly exhibited unusual behavior.

Prior to the commencement of the hearing on the government's Petition, the defendant was permitted, by the Court, to read a motion which he prepared. (Tr 7)

It was after hearing his motion that the Court raised the question of Mr. Flynt's mental state. The language as well as the substance of Mr. Flynt's motion put the Court on notice of Flynt's inability to understand what was occurring during the proceeding and also to raise questions as to whether Mr. Flynt was acting in a reasonable and rational manner. The Court acknowledged as much when addressing Mr. Flynt:

> ". . . I understand that you have physical problems, and my short observation of you in listening to your motion causes me to believe that you may have psychiatric problems as well. Springfield, Missouri, is equipped to handle both of those and we will discuss later whether some designation of Springfield might be appropriate." (Tr 11)

The discussion of the issue of a designation to Springfield never took place and the hearing commenced.

It was at the close of the hearing after the one witness for the government had testified that Mr. Flynt demonstrated, as before, his inability to control himself. It was this conduct, very much similar to the conduct complained of in the government's Petition, that led to the finding of contempt.

Mr. Flynt may have suffered a violation of his constitutional right to due process by the Court's failure to order a psychiatric evaluation of his competency prior to the hearing on the government's Petition. This was a serious risk which should and could have easily been avoided.

Every indication pointed toward the defendant's incompetence: his notorious reputation for committing acts that defy the imprimatur of rationality and competency in the community and his antics against self-interest in courts of law.

This Court has held that evidence of irrational behavior, demeanor at trial, or any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required. Even one of these factors standing alone may, in some circumstances, suggest a change that would render the accused unable to meet the standards of competence to stand trial. *Prope* v. *Missouri,* 420 US 162, 43 L Ed 2d 103, 95 S Ct 896 (1975).

During the proceedings of December 6, 1983, in a continuation of proceedings begun that morning without the defendant being present, the Assistant United States Attorney urged the District Court to send Mr. Flynt to a facility for psychiatric evaluation for a period of six months. (Tr 3, 12-6-83, 4:00 p.m.)

The action of the Assistant United States Attorney in urging the District Court for a psychiatric evaluation of Mr. Flynt, was consistent with the dictates of Title 18 USC section 4244. Under this statute, it was the duty of the District Court to cause Mr. Flynt to be examined as to his mental condition by at least one qualified psychiatrist who would then report to the court.

In its Order, the Seventh Circuit failed to address this fact, *viz.,* that the government itself had asked for a psychiatric examination under Title 18 USC section 4244 and that his examination was, therefore, mandated. However, the Seventh Circuit acknowledged in a footnote at the conclusion of its opinion:

> "[11] Our affirmance does not mean that we would necessarily have dispensed with a Section 4244 evaluation if we were sitting as *nisi prius* judges." (Unpublished Order 8)

This Court should grant certiorari to establish guidelines for Section 4244 when dealing with unruly defendants who may be afflicted with a mental disorder.

THE DECISION BELOW SERIOUSLY ERODES THE FEDERALLY GUARANTEED CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WHEN THE SEVENTH CIRCUIT PREMISED ITS DECISION ON FACTS NOT CONTAINED IN THE RECORD. THIS COURT SHOULD GRANT CERTIORARI TO REINFORCE THE PRINCIPLE THAT MATTERS NOT CONTAINED IN THE RECORD MUST NOT BE CONSIDERED IN THE DISPOSITION OF AN APPEAL.

The only issue before the Seventh Circuit for review was whether the District Court erred in failing to order a psychiatric evaluation before proceeding with the hearing on a rule to show cause when the behavior of the defendant raised the question of his competency. The Seventh Circuit erred when it considered facts not properly in evidence in deciding the instant appeal.

The error is evidenced by this statement:

> "[8] This Court does not decide whether or not Flynt was actually competent at the time of the proceeding. However, at oral argument we were advised that Flynt was found competent by the federal facility at Springfield, Missouri soon after the contempt hearing." (Unpublished Order 6)

Thus, the Seventh Circuit premised its decision on facts not contained in the record. It is well established that only matters of record can be argued by the parties and considered by the court.

This Court should grant certiorari to reinforce this basic principle of appellate procedure.

CONCLUSION

For any or all of the foregoing reasons, certiorari should be allowed. On the merits, petitioner respectfully urges that his contempt conviction in the trial court be reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
Argued June 5, 1984

July 19, 1984

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. EDWARD DUMBAULD, Senior District Judge*

No. 84-1012

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

LARRY FLYNT,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 83 CR 950
FRANK J. MCGARR, Chief Judge.

ORDER

Larry Flynt appeals from an order of Chief Judge McGarr finding him in present criminal contempt and imposing a 60-day sentence for conduct during a show

* The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, is sitting by designation.

cause hearing before the judge on December 6, 1983.[1] Flynt appeared[2] at this hearing to respond to charges that he be held in criminal contempt for conduct the previous day before Magistrate Olga Jurco.[3] Flynt contends only that the sentence should be vacated because his behavior before the hearing created such doubt about his competency to proceed that the district court erred in failing first to obtain a psychiatric evaluation of Flynt's competency pursuant to 18 U.S.C. § 4244.[4] But Flynt does

---

[1] Flynt had completed this sentence some time before oral argument here. Completion of service of the contempt sentence does not, however, render the appeal moot since unfavorable collateral consequences are presumed to exist as a result of the contempt conviction. *In re Stewart,* 571 F.2d 958 (5th Cir. 1978); *United States* v. *Camil,* 497 F.2d 225 (5th Cir. 1974); see also *Sibron* v. *New York,* 392 U.S. 40.

[2] An attorney who had been retained by Flynt was present with him at the proceeding but served in an advisory capacity only (Dec. 6 Tr. at 3). Flynt is represented by another attorney on this appeal.

[3] Flynt was charged with interrupting proceedings before Magistrate Jurco by using "obscene and scurrilous language" and throwing a folded Soviet flag at the Magistrate. ¶ 3, Pet. for a Rule to Show Cause, filed with Judge McGarr on December 6, 1983.

[4] Section 4244 provides in pertinent part:

> Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceed-

not contend that he actually was incompetent at the time of the proceeding, nor does he claim that the contempt conviction was unwarranted if Judge McGarr's decision to proceed with the hearing was proper.

The government argues that the conviction should be allowed to stand because Flynt's behavior at the hearing itself did not indicate that he was incompetent but rather justified the present criminal contempt conviction.

I. Background

Flynt's December 6 appearance before Judge McGarr was the last of three appearances by Flynt before Northern District of Illinois courts in as many days. Flynt had been arrested at O'Hare Airport on December 3 for violating a bond condition, set in the Central District of California, prohibiting Flynt's unauthorized departure from California. On December 4, he appeared before Magistrate Jurco in proceedings in which the government sought his removal to California. In response to Flynt's request to retain counsel and obtain an identity hearing, the removal proceeding was continued to December 5. During this December 5 appearance, Flynt allegedly performed the acts charged in the government's Show Cause petition. See *supra* note 3. Finally, in connection with the Show Cause petition, Flynt appeared before Judge McGarr on December 6. At this hearing, the attorney accompanying Flynt and Flynt himself informed the court that Flynt was acting *pro se* and relying on the attorney as an advisor only.

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[4] (Continued)

> ings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court.

In response to Flynt's request for a continuance until January 1 to prepare for the hearing, the court explained that because the factual issues were limited to "whether you did those things [charged to have been done before the Magistrate] or whether you didn't" (Tr. 4), the court would immediately hear the government's case, allow cross-examination, and then recess for a few days so that Flynt could prepare his defense (*Id.* at 4, 6).[5]

Following his preliminary requests regarding media presence in the court room (*Id.* at 5-7), Flynt read into the record a motion he had prepared previously in which he sought (1) removal to a medical facility for "the proper medical treatment * * * [and] comprehensive psychiatric evaluation" (*Id.* at 8); (2) a lay-over in Kentucky to honor a speaking invitation at a church there; (3) the setting of bail at Christmas time for all federal prisoners; and (4) immediate release of four individuals "to the best of my knowledge, presently confined in a mental or federal institution somewhere" (*Id.* at 9). Flynt concluded his motion with the oral diatribe reproduced below.[6]

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[5] Reference throughout this order to the hearing transcript are to the transcript for the hearing which occurred at 12 noon on December 6.

[6] "Wherefore, the petition, most humbly requests, that the above relief be granted. Should the Court deny this motion I demand that it be scheduled for hearing immediately before the United States Supreme Court so that I may once again assert my First Amendment rights of free expression to those inept, incompetent assholes, one token cunt and nigger.

"I hope that this dishonorable Court does not find that I am showing contempt to the system I have done my damnest to conceal.

"I pray to the Lord Jesus Christ that this motion be granted. I have come in peace, but with a big fucking sword and one hell of a club. To decline this motion would be tantamount to treason, or should I say obstruction of justice. At which time I will order the FBI to

The judge responded to Flynt's motion and diatribe as follows:

> Some of these matters relate to a proceeding which I understand is pending against you in another court. I have no understanding or competence to rule on them. The other motions are out of order and will be denied. The only one I consider seriously, and we will discuss this, is your request to be moved to a medical facility, namely, Springfield, Missouri. I understand that you have physical problems, and my short observation of you in listening to your motion causes me to believe that you may have psychiatriet problems as well. Springfield, Missouri, is equipped to handle both of those and we will discuss later whether some designation of Springfield might be appropriate.

Tr. 10-11.

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[6] (Continued)
arrest every member of this Court and place them in custody with the federal marshals in Washington, DC.

"I am about the Lord's work, you mother fuckers, so move over. I am not the second coming, I would like to emphasize, but I am the new kid on the block and it is not the Last Supper, assholes. It is the morning after and I am his main man.

"Signed Larry Claxton Flynt, F-l-i-n-t-, or F-l-y-n-t, or F-l-y-n-n, or F-l-i-n-t, S-t-e-i-n, F-l-i-n, S-t-i-e-n, depending on how much trouble you have, or should I say difficulty you have, hiding from Nazis like Ronald Reagan, Caspar Weinburger, Henry Kissinger, Warren Burger and yourself.

"I demand that Justice Paul Stevens receive this write for certiorari.

"I demand a stay of these proceedings until this has been decided. Furthermore, I have petitioned the 9th Circuit last night, as well as Judge Takasugi, as well as the Supreme Court. Again I would like Justice Stevens to receive it. I am willing to give up my source but I want to do so in the presence of the FBI and Judge Takasugi.

"Thank you, your Honor."

Tr. 9-10.

The show cause hearing itself commenced after this exchange, and the government presented its single witness, a Deputy United States Marshal who witnessed Flynt's behavior before the magistrate. Flynt cross-examined this witness. At the conclusion of the government's case, the judge ordered the proceeding continued for several days. While the judge was making arrangements to provide for Flynt's medical care in the interlude, the exchange which resulted in Flynt's contempt conviction and 60-day sentence occurred.[7]

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[7] THE COURT: Who is here from the MCC [Metropolitan Correctional Center] that can help us out?

AN OFFICER: I am here, Judge.

THE COURT: What is the doctor—

MR. FLYNT: And I order that a nurse be present and a physical therapist be present with me at all times—

THE COURT: Be quiet.

MR. FLYNT: Don't tell me to be quiet, you son of a bitch.

THE COURT: All right, you know—

MR. FLYNT: Charge me with contempt again, you dog mother fucker.

THE COURT: That raises questions as to your sanity. All right, I have been called obscene names and spit at—

MR. FLYNT: You know when I will leave Chicago, when you suck a dick, mother fucker, that is when I will leave.

THE COURT: All right, I find Mr. Flynt in contempt of court.

MR. FLYNT: I guess I will be here until hell freezes over. Fuck you, you asshole. Who the hell do you think you are?

THE COURT: I find Mr. Flynt in contempt of court, a contempt committed in the presence of the Court. I sentence him to the custody of the Attorney General for a term of 60 days.

II. Discussion

The only issue before this Court is whether or not the district court erred in failing to order a psychiatric evaluation before proceeding with the show cause hearing or at least before finding Flynt in contempt.[8]

Title 18 U.S.C. § 4244 establishes procedures for determining whether or not a federal defendant is competent to participate in criminal proceedings against him. Under these procedures the district judge was required to order a psychiatric evaluation of Flynt if there was "reasonable cause to believe [the defendant] may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense," *i.e.*, if there was "reasonable doubt" as to Flynt's sanity or competency. See, *e.g.*, *United States* v. *Johns*, 728 F.2d 953, 956 (7th Cir. 1984); *United States* v. *Metcalfe*, 698 F.2d 877, 881 (7th Cir. 1983), certiorari denied, ... U.S. ....., 103 S.Ct. 1886.

Competency is defined as the "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether [the defendant] has a rational as well as a factual understanding of the proceedings against him" *Dusky* v. *United States*, 362 U.S. 402.

Reviewing the proceeding below in light of this standard, we conclude that the district court had no reasonable cause to believe Flynt was incompetent during the December 6 proceeding. Flynt consulted with an attorney before as well as during the proceeding, and the attorney did not indicate to the court at that time that he

[8] This Court does not decide whether or not Flynt actually was competent at the time of the proceeding. However, at oral argument we were advised that Flynt was found competent by the federal facility at Springfield, Missouri, soon after the contempt hearing.

doubted Flynt's competence. Admittedly, the attorney's silence in this case is not conclusive, especially since the attorney apparently lacked familiarity with his client, see *United States* v. *Johns*, 728 F.2d 953, 956 (7th Cir. 1984). But it is some evidence that Flynt's conduct, while eccentric, appeared to be in the range of legally competent behavior in the light of his background. Furthermore, there was nothing in Flynt's interaction with the attorney to indicate to the court that Flynt could not consult with a lawyer "with a reasonable degree of rational understanding," the standard enunciated in *Dusky*, 362 U.S. at 402. Finally, the fact that Flynt insisted on representing himself did not, of course, provide any basis for doubting his competence, and Flynt does not so contend now.

There was also no compelling reason for the district judge to doubt that Flynt had a "rational as well as factual understanding of the proceedings," *Dusky*, 362 U.S. at 402, and order an immediate Section 4244 evaluation. Flynt participated fully in the proceeding, essentially serving as his own counsel. He made several prehearing motions which in form and content indicated that he understood he was participating as a defendant in a contempt proceeding. For instance, he explained that his several motions regarding the proceeding's press coverage arose from a concern about his ability to get a fair trial.[9] His motions immediately preceding the diatribe showed he understood that court permission was necessary for him to go places and obtain services he wanted while he was in federal custody. The fact that he appended to this motion requests for the temporary or permanent freedom of other prisoners only underscored the fact that Flynt understood the nature of a judicial pro-

[9]Apparently press coverage of the actual proceedings was limited due to courtroom space limitations. There is no claim on appeal, and no indication in the record, that the district court's press coverage arrangements impinged on Flynt's ability to obtain a fair trial.

ceeding and the breadth of judicial authority. Rather than raising doubts about Flynt's competency, these motions, which Flynt undisputedly prepared himself, show his rational and factual understanding of the proceedings.

This understanding is made even more evident by Flynt's conduct during the show cause hearing itself. Flynt participated fully in this hearing and made several motions and objections directed toward excluding government evidence and undermining its case. He objected that the government attorney's opening statement contained hearsay (Tr. 15). He moved for dismissal of the charges because his name was misspelled (Tr. 17). He objected to admission of physical evidence (Tr. 20). He objected successfully to admission of certain testimony (Tr. 21). He demanded a jury trial (Tr. 22). After cross-examining the government's only witness, Flynt moved that the witness be charged with perjury (Tr. 25).[10] Flynt's ability to participate in the hearing in this logical and goal-directed manner sufficiently demonstrated to the district judge Flynt's rational and factual understanding of the proceeding.

On appeal, Flynt contends that his diatribe at the conclusion of his pre-trial motions should have raised in the district judge "reasonable doubt" as to Flynt's competency, so that the court's failure to halt the proceeding for a Section 4244 examination tainted the subsequent contempt conviction. However, while Flynt's diatribe was offensive and politically hostile, it did not by itself give the district court "reasonable cause to believe that [Flynt was] so mentally incompetent as to be unable to under-

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[10] The witness testified that Flynt was about six feet from Magistrate Jurco during the December 5 proceeding, whereas the charge stated he was three feet away (Tr. 25). The district court denied the perjury motion, noting that the testimony also indicated that "you were sitting yesterday approximately where you are sitting today, which is something in excess of six feet" (Tr. 25).

stand the proceedings against him or properly assist in his own defense." Section 4244. Flynt's use of obscenities was in harmony with his *Hustler* magazine and therefore did not compel a mental examination.

At most, Flynt's diatribe and eccentric conduct may have raised suspicions about his competence. But recent decisions of this Court teach that a defendant's other conduct during the proceeding may either cause the suspicions to be dissipated, see *United States* v. *Metcalfe,* 698 F.2d 877, 881-882 (7th Cir. 1983), certiorari denied, ... U.S. ....., 103 S.Ct. 1886, or may raise the suspicions to "the level of a bona fide doubt" about competence. *United States* v. *Johns,* 728 F.2d 953, 956 (7th Cir. 1984). In the instant case, it is clear that even if the diatribe raised the district judge's suspicions, those suspicions were amply dissipated by Flynt's ability, both before and after the diatribe, to participate meaningfully in the proceeding and consult with an attorney.

Flynt argues that the district court's observations that Flynt might have psychiatric problems (Tr. 11, 29) evidenced its doubts throughout the proceeding about Flynt's competency and show that a Section 4244 evaluation should have been ordered immediately. However, it is well settled that mental illness and legal incompetency are not necessarily synonymous, *United States* ex rel. *Rivers* v. *Franzen,* 692 F.2d 491, 500 (7th Cir. 1982), so that the court's comments about Flynt's mental health bear no necessary relationship to its reasonable belief about his legal competence. A review of those comments in context makes clear that the court was attempting to determine what kind of medical treatment should be made available to Flynt while he remained in federal custody rather than evaluating Flynt's competency to participate in the show cause hearing. In any case, the test for whether there is reasonable doubt as to competency is objective not substantive, *Franzen,* 692 F.2d at 497, so that the district court's subjective state of mind is not relevant to our inquiry.

Because we conclude that the district court did not err in proceeding with Flynt's show cause hearing without obtaining a Section 4244 evaluation, and because Flynt does not claim that his contempt conviction was improper on any other basis, his conviction is affirmed.[11]

[11] Our affirmance does not mean that we would necessarily have dispensed with a Section 4244 evaluation if we were sitting as *nisi prius* judges.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 16, 1984

Before

Hon. Walter J. Cummings, Chief Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Edward Dumbauld, Senior District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 84-1012 vs.

LARRY FLYNT,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 CR 950
Frank J. McGarr, Chief Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, is sitting by designation.